There will be judgment for the plaintiff for $4,070 and $577 which represents interest at 10 per centum per annum from the 31st January, 1961, to the 30th June, 1962, which makes a total of $4,647. The defendant must pay the costs of the action. The defendant's counterclaim is also dismissed and he must pay the costs. There will be the usual interest on the sum claimed and the costs at 6 per centum per annum.

Judgment for the plaintiff.

Counterclaim dismissed.

Solicitors: *Mitra & Co.; K. Chelvanayagam.*

THE CHINA ENGINEERS LTD. v. R.M. SAMY & THEE KENG CHOON (3rd Party)

[O. C. J. (Ong J.) July 18, 1962]

[K.L. — Civil Suit No. 181 of 1959]

Contract — Work done and goods supplied — Guarantee by defendant — Contracts (Malay States) Ordinance, 1950, ss.64 and 186 — R.S.C., O.16A — Third party — Counterclaim.

The plaintiff supplied tiles to and did the tiling in respect of the defendant's house which was being built by the third party, a contractor. The defendant himself selected the tiles and agreed to the rates quoted. He also guaranteed that he would make payment while the work was in progress. On the defendant failing to pay after the tiling was completed the plaintiff sued him. The defendant brought in the third party against whom he sought to be indemnified.

Held: (1) notwithstanding that the third party was an independent contractor in respect of the contract for the whole building, he was acting as the defendant's agent in respect of the tiling job;

(2) there was no obligation on the part of the plaintiff to demand payment while work was in progress, and therefore the defendant was also liable as guarantor.

CIVIL SUIT.

N. A. Marjoribanks for the plaintiff.

G. K. M. Mohan for the defendant.

T. C. Tang for the 3rd Party.

Ong J.: The plaintiff claims from the defendant the sum of $3,101.60 being the cost of material and labour charges for flooring and tiling work carried out at the defendant's request on his house in Jalan Lambah, Petaling Jaya, in 1958. The cause of action pleaded was that the goods and services were supplied to one Thee Keng Choon as the defendant's contractor and agent; further and in the alternative, that payment was guaranteed by the defendant under a letter of guarantee dated February 25, 1958 addressed to the plaintiff. That letter was as follows:

> "Proposed tiling on Lot 15/2 of my house Jalan Lambah, Petaling Jaya, K. Lumpur.
>
> I am directed to inform you that I guarantee payment of the above job if my contractor fails to make payment.
>
> Payment will be made by me or by my contractor while the work was in progress.
>
> I shall be grateful if you would commence the job as early as possible."

In a verbose defence of unnecessary length the defendant denied liability on a great variety of grounds, namely: (a) that the goods were not supplied to him; (b) that the letter of guarantee was for work and not for goods supplied; (c) that the plaintiff should have exhausted all remedies against the contractor before instituting action against the defendant; (d) that the contractor was not the defendant's duly authorised agent; (e) that the tiling work was performed between March 5 and May 31, 1958 and that payment was not demanded till after the tiling was completed and the last payment made by the defendant to his contractor, instead of while the work was in progress; (f) that variation of the term of the contract as to payment made between the plaintiff and the contractor without the defendant's consent discharged him from liability under the letter of guarantee; (g) that the extension of time given to the contractor to pay also discharged the defendant from liability as guarantor and (h) estoppel.

By a Third Party Notice the contractor was brought in as a third party and against him the defendant sought to be indemnified against any judgment given in favour of the plaintiff on the grounds following: (a) that shortly after the tiling was performed the third party failed to complete the building; (b) that the defendant's progress payments to the third party included payment for tiling, and the last payment made to the third party was on July 30, 1958, after the tiling had been completed; (c) that the third party had informed the defendant that he had fully paid for the tiling and thereby obtained the last payment on July 30. In addition, the defendant repeated his various other defences to the plaintiff's claim without any regard to their relevancy.

In the defence of the contractor, as third party, he stated that the contract price was $22,500 for the whole building but he had been paid only a total of $15,000; and that after completion of the building the defendant forcibly took possession thereof without settling the balance due to him. As to the tiling work, he stated that it was agreed between him and the defendant that the work should be done by the plaintiff, and the cost thereof payable by the defendant to the plaintiff should be deducted from the contract price. The third party further stated that in respect of the tiling job he was acting as the defendant's agent and he counterclaimed from the defendant a sum of $4,398.40 as the balance due to him after deducting the plaintiff's charges amounting to $3,101.60.

In the defendant's reply to the third party's counterclaim the defendant stated that he had paid a total of $19,000 to the third party; that after July 30, 1958 the third party ceased work to complete the building, as a result of which the defendant had to employ others to complete the works contracted for at a total cost of $3,084,

and he claimed from the third party this sum plus $3,000 general damages for breach of contract.

By his reply the defendant took the extraordinary course of adding thereto a counterclaim which is entirely outside the scope of Order 16A of the Rules of the Supreme Court. It was in effect a claim against the third party for damages for alleged breach of contract, of which there was no mention in his application for leave to issue the third party notice, and for which consequently no leave had been given. I ruled that the action should proceed in so far as any matters raised are relevant to the claim of the plaintiff and to the defendant's claim to be indemnified by the third party, leaving it to be decided, at a subsequent stage of the proceedings, whether I should consider it expedient, on the evidence before the Court, that the defendant and the third party should be permitted, by agreement, to pursue their cross-claims *inter se*. In the event, I have decided that they should not be disposed of in this same action.

As to the plaintiff's claim, I am clearly of opinion that the facts admit of little controversy. The job was done at an agreed price to the defendant's house for which the plaintiff is entitled to payment of the sum claimed. On the evidence it is clear, and I find as a fact, that, notwithstanding that the third party was an independent contractor in respect of the contract for the whole building, in so far as the tiling job was concerned, he was acting as the defendant's agent.

I accept as a true account of what took place, the evidence of Wong Shui Chong (P.W. 2), the plaintiff's salesman, that the defendant said that he was building a house and he wanted to give the plaintiff the tiling job contract; that defendant himself selected the tiles and agreed to the rates quoted. These statements were not challenged in cross-examination. I would add that as between the defendant and the third party, I have no hesitation in preferring the latter as the more truthful and credible witness. The plain fact which stands out above all others in this case is that the cost of tiling had been deducted from the contract price and it fell to the defendant to pay it. The deduction having been agreed upon, it must stand to reason that, in dealing with the plaintiff, the third party could not have been contracting as a principal. The third paragraph of the letter of guarantee was in my view, a direct order by the defendant to the plaintiff to proceed with the tiling job for the payment of which the defendant in the preceding paragraphs made himself responsible. Even if the third party admitted to being personally liable my view is that once the fact of an agency had been established the plaintiff is at liberty to elect whom he would sue. The law on this point is set out in section 186 of the Contracts (Malay States) Ordinance, as follows:

> "In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable."

In this connection I think that article 90 of *Bowstead* on Agency (12th Ed.) at p. 199 is also relevant:

> "Where an agent enters into a contract, oral or written, in his own name, parol evidence is admissible to show who is the real principal, in order to charge him or entitle him to sue on the contract, provided that such evidence is not inconsistent with the terms of a written contract."

Apart altogether from his liability to the plaintiff as principal, the defendant is also clearly liable as guarantor. The letter of guarantee is unequivocal in its terms. The reference to payment "while the work is in progress" can in no way be construed as a condition. I am unable to read it as imposing a condition that, unless demand was made for a payment or payments while work was in progress, the guarantee was null and void. The undertaking of the defendant to pay cannot reasonably be construed as imposing an obligation on the plaintiff to demand payment while work was in progress. The promisee, which is the plaintiff in this case, was at liberty to dispense with performance under section 64 of the Contracts (Malay States) Ordinance. Nor can I read into the letter of guarantee anything in the nature of an obligation imposed on the plaintiff to inquire into the accounts between the plaintiff and the third party. In the result I give judgment for the plaintiff for $3,101.60 against the defendant; with interest at 6% per annum and costs of this action to be taxed.

As to the defendant's claim to be indemnified by the third party, the defendant himself admitted that he had paid no more than $19,000 towards a contractual liability of $22,500. It will be observed that a balance of $398.60 stands to the credit of the third party after deduction of the plaintiff's bill from the contract price of $22,500. The claim of the defendant against the third party is accordingly dismissed with costs. As stated before, I do not propose in this action to decide on the cross-claims between the defendant and the third party.

Judgment for the plaintiff.

Solicitors: *Lovelace & Hastings; Cheah Theam Swee & Co.; T. C. Tang & Co.*

FOO TOCK LIN v. PIONG KEW

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) October 29, 1962]

[K.L. — F.M. Civil Appeal No. 27 of 1961]

Contract — Oral agreement for sale of house — Written agreement containing different terms — Whether oral evidence admissible to prove true terms — Whether there was consideration for written agreement.

The appellant alleged that in February 1961, she agreed orally to sell a piece of land for $20,000 payable in one sum to the defendant. Pursuant to this agreement, the plaintiff executed a document of transfer in respect of the land in favour of the defendant and the consideration as stated therein was $1,200. By a written